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No. 92-14

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IN RE: PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, DEBTOR

MARTIN ROCHMAN, EDWARD KAUFMAN
and ROBERT C. RICHARDS

Petitioners,

v.

NORTHEAST UTILITIES SERVICE COMPANY
and OFFICIAL COMMITTEE OF EQUITY
SECURITY HOLDERS

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT STATE OF NEW HAMPSHIRE IN OPPOSITION TO THE PETITION

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Respondent State of New Hampshire, through its Attorney General, hereby submits its Brief in Opposition to the Petition for Writ of Certiorari. The State was a party in interest in the Bankruptcy Court and a party in the district court and court of appeals.

INTRODUCTION

Petitioners[1], three individuals holding less than 0.5% of the stock of Public Service of New Hampshire ("PSNH"), seek to unravel the consensual bankruptcy reorganization plan that restored the largest utility in New Hampshire to financial health and provided rate certainty to ratepayers in New Hampshire. RKR was the only party to challenge the consensual plan below, and its claims were rejected by the bankruptcy and district courts; then, after the PSNH reorganization had been completed, the court of appeals denied their appeal as moot. Petitioners now seek review here on the argument that the court of appeals had no discretion to dismiss their appeal as moot, even though the entire PSNH reorganization had been completed, all parties had relied on the reorganization in consummating the thousands of transactions necessary to bring PSNH out of bankruptcy, and the relief requested — undoing the reorganization — would have caused serious and immediate economic harm to parties and nonparties and left the bankruptcy court the "nightmarish" job of cleaning up the resulting mess. Pet. App. 24a. Petitioners do not cite a single decision of this Court which would have required the court of appeals to entertain such a moot appeal or have compelled it to order such drastic relief. There is no support for the petition, and it should be denied.

COUNTERSTATEMENT OF THE CASE

The history of this case is long and complex, and the facts pertinent here are documented accurately by the opinions of the court of appeals and district court (in contrast to the argumentative factual recitation provided by petitioners). *See* Pet. App. at 2a-9a, 35a-54a.

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[1] Petitioners Rochman, Kaufman and Richards refer to themselves, collectively, as "RKR." The State will use this designation.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' APPEAL WAS PROPERLY DETERMINED TO BE MOOT

Article III of the Constitution does not permit federal courts to adjudicate cases or controversies for which no remedy is available — *i.e.*, "moot" cases. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). A case or controversy is deemed moot if the injury alleged is not "*likely to be redressed* by a favorable judicial decision," *id.* at 477, or is not "admitting of *specific relief* through a decree of a conclusive character." *Id.* (internal quotations omitted; emphasis added). *Cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) ("a realistic appreciation of the consequences of judicial action" is required). Thus, "it is not enough" that a claim was remediable "when suit was filed," *Lewis*, 494 U.S. at 477; a remedy must be available throughout the action and any appeals. *Id.*

Petitioners' action became moot on May 16, 1991 when, as the court of appeals indicated, "PSNH became committed to implement the numerous complex arrangements required to enable its restructuring and to finance the distributions contemplated under the confirmed plan." Pet App. 21a. Petitioners had the opportunity to seek a stay of these transactions in the court of appeals,[2] but did not do so. *Id.* 16a-18a. Having not sought a stay, "the innumerable transfers legitimately effected to and among innocent third parties in the absence of a stay, and in reliance on the order of confirmation and the rate agreement [with the State] . . . plainly represent[ed] so substantial a consummation of the reorganization plan as to render the requested appellate relief impracticable." *Id.* 23a.

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[2] *Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1148 (1992).

Petitioners argue, however, that the First Circuit was required to ignore these considerations, decide the case on the merits, and then woodenly grant the equitable relief requested. Pet. at 49, 54. But even if, contrary to *Lewis*, the court of appeals had reached the merits and ruled for petitioners, it would have been a futile act, for equitable relief clearly would not have been appropriate. "[A]n injunction is an equitable remedy that does not issue as of course." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Rather, a court must account for "the important role of the 'public interest' in the exercise of [its] equitable discretion." *Amoco*, 480 U.S. at 545.

Here, the relief requested by RKR plainly was *in*consistent with the public good: RKR's action furthered only its parochial financial interests. All other parties — including the debtor, the State, and each creditor group — agreed to the consensual plan even though it required every party to make concessions. Pet. App. 42a. After extensive hearings, the plan was deemed "a fair and equitable compromise" by the bankruptcy court (*id.* 65a), and the district court affirmed. *Id.* 59a. Further, the Federal Energy Regulatory Commission found the reorganization of PSNH, and its merger with Northeast Utilities Co., to be in the public interest. *Northeast Utilities Service Co.*, 53 FERC ¶ 63,020, at 65,211-12 (1990), *summarily aff'd*, 56 FERC ¶ 61,269, at 61,993 (1991). The public interest supported *preserving* the reorganization plan, not dismembering it.

II. RKR's "PRUDENT INVESTMENT" ARGUMENT IS BARRED BY RES JUDICATA

Petitioners' alternate basis for review rests on the premise that "[t]his case is ultimately about whether PSNH has a right to recover its prudent investment in Seabrook." Pet. at 57. This is entirely inaccurate. RKR's argument that PSNH should be entitled to recover all prudent Seabrook costs was addressed by the New Hampshire Public Utilities Commission when it approved the Rate Agreement. Pet. App. 5a. The PUC rejected RKR's claim for lack of standing, its decision was affirmed by the New Hampshire Supreme Court, and RKR sought review in this Court on the same issue it seeks to raise anew in this petition,[1] but review was denied. *Appeal of Richards*, 134 N.H. 148, 590 A.2d 586, *cert. denied*, 112 S. Ct. 275 (1991).

The bankruptcy and district courts correctly focused their inquiries instead on whether, as RKR had contended, PSNH could recover in a litigated rate case more than the $1.5 billion value provided in the reorganization plan. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (bankruptcy court must assess "the probabilities of ultimate success should the claim be litigated"). Both the bankruptcy and district courts found PSNH would not likely succeed in such a suit for multiple reasons. First, a public utility commission is not required to employ the "prudent investment" standard in ratemaking determinations (as RKR had argued). *See Duquesne Light Co v. Barasch*, 488 U.S. 299, 315-16 (1989). Second, *the most* PSNH would have requested in a rate case was $1.8 billion (which was the investment reflected on its Seabrook accounts)

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[1] Petitioners' question presented asked "whether [the Rate Agreement] will enable PSNH to recover its prudent investment" in Seabrook. Pet. at i, *Richards v. New Hampshire*, No. 91-200.

(pet. app. 91a n.2), and this amount was only $300 million more than the consensual plan would provide. This $300 million gain would not have offset the $528 million in additional debt costs resulting from a three-year delay to litigate the rate case. Pet. App. 188a, 154a. Finally, RKR's proposal to impose virtually all Seabrook's "crushing costs" (Pet. at 8)[1] on New Hampshire ratepayers was inherently counterproductive (Pet. App. 187a-188a), for a full Seabrook recovery, even if obtained, would have caused PSNH's rates to be approximately *double* the rates of other utilities in New England. *Id.* 99a-100a. This would have forced New Hampshire businesses to relocate or close (*id.* 104a), in turn leaving a smaller customer base to absorb the costs, and ultimately causing a "death spiral" to occur. *Id.* 100a-101a. These findings were well supported by the record, and could not have been considered clear error, even had the court of appeals reached the merits.

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[1] "Seabrook is the most expensive nuclear plant ever built, for its capacity." Pet. App. 120a.

CONCLUSION

The opinion of the court of appeals is entirely consistent with this Court's opinions, presents no conflict with any other court, and presents no issue of broad or recurring significance. By petitioners' own admission, "[s]uch a claim presumably could only happen in a utility bankruptcy and may in fact never happen again." Pet. at 54 n.9. The petition should be denied.

Respectfully submitted,

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